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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

290 MADISON CORPORATION, JAMES DELANEY and HELEN DELANEY,

Petitioners,

vs.

CARMINE E. CAPONE, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

FRANCIS J. DOOLEY,
Counsel of Record,
300 Main Street,
Orange, New Jersey 07050
(201) 673-7788

Attorney for Respondents, Carmine E. Capone, James J. Brown, Raymond M. Codey, Anthony Della Salla, Ernest Monfiletto, Patricia Juliano, Benjamin F. Jones, Michael Marucci, Joel L. Shain, Quincy Lucarello, Past and Present Commissioners and Councilmembers of the City of Orange.

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RULE CITED:

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THE PETITION DOES NOT PRESENT ANY ISSUE QUALIFYING SAME FOR A WRIT OF CERTIORARI

"A review on Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore," *Rule* 17 (1980) of the *Rules of the U.S. Supreme Court.*

The Petitioners have failed to satisfy any of the stringent criteria which the Supreme Court mandates as a condition precedent in determining the suitability of a Petition for a Writ of Certiorari. Rather, the Petitioners, under the guise of asserting "an important question of Constitutional law which has not been, but should be, resolved by the Supreme Court . . ." (Petitioners' Brief, Pg. 7), have rehashed the very issues resolved in the Courts of the State of New Jersey (Petitioners' Appendix A-29 to A-48) and in the Federal Courts (Petitioners' Appendix A-11 to A-28).

Petitioners state: "While the constitutionality of a Rent Control Ordinance is not challenged here, its application and effect is alleged to have constituted a 'taking' without just compensation." (Petitioners' Brief, Pg. 7). What then are the constitutional issues that Petitioners ask this Court to address? Further, Petitioners' statement that the application and effect of the Rent Control Ordinance has not been addressed previously by this Court, is a misstatement, again, because as plaintiffs, they failed to establish causation. (Petitioners' Appendix A-22 to A-26).

It is suggested that Petitioners are asserting that the Findings of Fact by the trial court should be set aside, and that the Petitioners should be allowed to present same, anew, for re-examination by the United States Supreme Court; such re-examination is proscribed by the Seventh Amendment and the Court's own Rules.

In addition, the Supreme Court is precluded by the so-called "two court rule", which prevents this Court from reviewing Findings of Fact and Conclusions of Law unanimously concurred in by two lower courts, absent a very obvious and exceptional showing of error. *Graver Tank and Mfg. Company v. Linde Air Products Co.*, 226 U.S. 271, 275, 69 S. Ct. 535, 538, 93 L. Ed. 672 (1949).

On its record, this case is an instance where a "five court rule" can be applied, in that three State Courts and two Federal Courts have at this juncture all concurred that the proximate cause of Petitioners' losing their building by mortgage foreclosure was not the fault of these defendants. The trial judge stated in his Findings of Fact:

> "In addition, the Delaneys' failure assiduously to separate their personal income, expenditures and financial accounts from those of the building, and their use of the building's substantial depreciation deductions for their personal income tax benefit, compels the conclusion that, for purposes of determining whether the mortgage foreclosure was causally related to defendants' actions, the corporate and individual plaintiffs must be treated as a single business entity. This confluence of corporation and individuals is absolutely fatal to proof that defendants proximately caused the mortgage foreclosure, for the evidence established that the Delaneys had income from their other investments easily sufficient to meet the mortgage payments and thereby avoid foreclosure." (Petitioners' Appendix A-24)

The convoluted attempts by the Petitioners to create Constitutional issues where none existed, is typical of Petitioners' tactics as reflected in the record of this case. When the Complaint was filed, it was captioned *James Delaney and Helen Delaney, t/a 290 Madison Corpora-*

tion, as plaintiffs. When Discovery was attempted against James Delaney and Helen Delaney, individually, (by way of motions to produce individual income tax records), affidavits were submitted to the Court stating that the real estate was owned by the 290 Madison Corporation. Said motion resulted in the caption of the case being changed to read *290 Madison Corporation*, as plaintiff.

At the conclusion of the trial, when the testimony and evidence revealed that James Delaney and Helen Delaney used the 290 Madison Corporation, and the real estate which was the subject of the suit, as a tax shelter, which generated a profit in excess of Two Hundred and Nine Thousand ($209,000.00) Dollars, by utilizing accelerated depreciation and crediting the building's paper losses against the private income of James Delaney and Helen Delaney (A-20, 21), a motion was made by plaintiffs to amend the pleadings to conform to the proofs elicited at the trial pursuant to Federal Rule 14 of Civil Procedure, to name James Delaney and Helen Delaney, individually, as plaintiffs. The motion was granted by the trial judge, Hon. Lawrence A. Whipple, U.S.D.J., so that the caption now identified as plaintiffs, *James Delaney and Helen Delaney*.

At the very least, in this regard, the caption of the Petition and the Statement of the Case (Petitioners' Brief, Pg. 2-6) do not reflect to this Court what transpired below. Petitioners have chosen to extrapolate from the record, and thereby distort, the facts in the Petition, to present financial losses suffered by them. The economic bottom line of the suit was that the Plaintiffs/Petitioners made a tremendous amount of money from the ownership of the building and land. (Petition, A-24).

Petitioners are arguing the applicability of *Owen v. City of Independence*, 48 U.S.C.W. 4389, 63 L.Ed. 673

(April 16, 1980) to the matter *sub judice*. *Owen*, supra, on its facts denied Qualified Immunity to a municipality, but, granted same to the municipal officials. In the matter *sub judice* the only defendants were the municipal officials; the municipality, City of Orange, was never named as a defendant. Consequently, *Owen* should serve as a basis for the denial of the Writ for Certiorari.

CONCLUSION

Petitioners, by whatever name or status they present to this court, have not qualified for a Writ of Certiorari. It is submitted that the Petitioners are merely seeking a review of the Findings of Fact, spuriously asserting that same contain Constitutional issues.

It is respectfully submitted that the Petitioners' Writ for Certiorari should be denied.

Respectfully submitted,

/s/ Francis J. Dooley
FRANCIS J. DOOLEY
Attorney for Respondents,
Carmine E. Capone, et al.